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IN THE

Supreme Court of the United States

October Term, 1959

No. 925

H. J. WILSON,

Petitioner,

vs.

CHARLES HENRY BEVILLE, *et al.*,

Defendants,

THE CITY OF LOS ANGELES, a municipal corporation,

Defendant and Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

H. J. Wilson has petitioned for a writ of certiorari directed to the District Court of Appeal of the State of California, Second Appellate District, Division One, to review the decision of that court in the above-entitled matter. It is respectfully submitted that, for the reasons hereinafter set forth, the petition should be denied.

Opinions Below.

The opinion in the decision which petitioner seeks to have reviewed is reported as *Wilson v. Beville,* 175 Advance California Reports (ACA) 531 [Hearing denied Jan. 20, 1960, 53 Adv. Cal. Rpts. No. 10, Minutes p. 2] and the opinion on the former Appeal in the case is reported as *Wilson v. Beville,* 47 Cal. 2d 852. Said decision in the former appeal [47 Cal. 2d 852], affirmed and reversed in part a prior opinion of the District Court of Appeal of the State of California, Second Appellate District, Division Two, which is reported as *Wilson v. Beville,* 290 P. 2d 70, 76. However, all decisions are in complete accord on the point involved herein, namely, the basis of any recovery petitioner is entitled to herein.

Jurisdiction.

Petitioner attempts to invoke the jurisdiction of this Court under section 1257(3) of Title 28 of the United States Code which provides for certiorari from a final judgment or decree of the highest state court where any title, right, privilege or immunity *is specially set up or claimed under the Constitution.* The complaint in this case was one to quiet title. Assuming there was no occasion to assert any right under the Constitution of the United States until the trial court on the second trial held that petitioner was entitled to compensation only in the amount of his lien on the property condemned, with interest from the date of commencement of his action, petitioner did not raise any federal question in his briefs filed on his Appeal from the second judgment nor in his oral argument to that Court.

He raised the federal question for the first time in his petition for rehearing filed in the District Court

of Appeal, which was denied, and subsequently in his petition for hearing in the California Supreme Court which was likewise denied.

1. Jurisdiction May Not Be Invoked by First Raising Federal Question in Petition for Rehearing.

In *Herndon v. Georgia*, 295 U. S. 441, 443, this Court said:

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Also see:

Radio Station W. O. W. v. Johnson, 326 U. S. 120, 128.

Nor did the California District Court of Appeal pass upon any federal question expressly or by implication, its decision being based upon a proper construction of a decision of the California Supreme Court on a prior appeal (*Wilson v. Beville*, 47 Cal. 2d 852), the application of certain California statutes to the facts of the case, and a determination of compensation due petitioner on account of an assessment lien in respect to certain property used as a public street since 1932. In view of these circumstances it is submitted that the judgment below rests completely upon State grounds. As stated in *Lynch v. New York, ex rel. Pierson*, 293 U. S. 52, 54:

> ". . . jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements wich are not part of the record.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . ."

And see;

Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635, 651.

Questions Presented.

The "Questions Presented" as set forth by petitioner on page 3 of his petition go far beyond the issues in the instant case. The question presented and determined in the instant case is simply whether a lienholder is intitled to an amount greater than his lien. As shown from the record filed herein and the decision of the District Court of Appeal, no questions of failure to compensate petitioner, ignoring state statutes, or denial of a jury trial are involved in this case as suggested by petitioner. Petitioner was compensated in the amount of his lien with interest; his only complaint is as to the insufficiency of the amount awarded.

In respect to denial of a jury trial, the record shows (as noted by the District Court of Appeal in its opinion) that the parties entered into a written stipulation which was prepared by counsel for petitioner and in which they agreed that the second trial should be limited to the legal issue of the proper construction of the decision on the prior appeal and as to whether the amount

of petitioner's damages was a matter of arithmetical calculation, and, in the alternative, that if not so calculable, then and only in that event was a jury trial to be had. (See Record herein, Stipulation and Order, dated March 14, 1958). The trial court determined that petitioner's damages was a matter of arithmetical calculation and that the amount was $207.57 with interest thereon from April 13, 1951, when this action was commenced.

No state statutes (Streets & Highways Code, Secs. 6555, 6571) were ignored as petitioner suggests and no question is presented on that point. As pointed out in the decision of the District Court of Appeal [*supra*] 175 A. C. A. 531, 532, 535:

> "On January 22, 1932, the City took possession of the portion of the property condemned and has devoted it to public use as a city street since that date. Taxes have not been levied on that portion of the property since 1927." * * *
>
> "When the lien was foreclosed it was a matter of public record that the easement was upon the property."

Therefore, since the lien was foreclosed on October 19, 1938, a treasurer's deed was not issued to petitioner's predecessor in interest until August 23, 1950, and petitioner obtained his interest in the property on April 12, 1951 by quit claim deed, it is clear that he has never had the property in any status other than subject to the City's street easement which was a matter of public record. The Supreme Court of California recognized this point when, in *Wilson v. Berille*, 47 Cal. 2d 852, 856, it stated ". . . the City has devoted the property to a public use since 1932. This fact pre-

cludes the plaintiff from gaining possession and thereby disrupting the public use—it vests the City with an easement." That being true, the state statutes referred to may not properly be construed as intending by the mere issuance of a treasurer's deed to enlarge petitioner's interest in the property and wipe out an old street easement which is of record. The California courts properly rejected petitioner's contention in this respect and did not ignore said state statutes as he alleges.

Statement of the Case.

The facts are as stated in the Opinion of the District Court of Appeal [*supra*], 175 A. C. A. 531. Petitioner's statement of the case is incomplete and does not give a true picture. Therefore, for the convenience of the Court, respondent will set forth below a brief summary of material facts:

Reduced to bare essentials the facts show that this is a case in which petitioner seeks to require the City to pay twice for a portion of a public street used as such since 1932. Petitioner claims title to the property involved by virtue of a City Treasurer's deed issued to his predecessor in interest after foreclosure sale of a street improvement bond issue pursuant to the Improvement Act of 1911 of the State of California (now Streets and Highways Code, Secs. 5000-6794). The assessment resulting in this bond was levied under the 1911 Act and recorded on November 23, 1927. It was in the amount of $207.57. Two days later, on November 25, 1927, the City commenced a condemnation action entitled City of Los Angeles v. House, being case No. 239,033, in the Superior Court of Los Angeles County, State of California, in which it took an easement for street purposes across only a part of the land upon which

said bond constituted a lien, but failed to name the then owner of that lien as a party defendant. About a month later, on December 28, 1927, the assessment not being paid, Bond No. 8, Series 2, was issued to the Municipal Bond Company in accordance with the procedures provided for by the state law. This is the source or origin of petitioner's present claim.

Thereafter, the following occurred (in chronological order):

1. July 23, 1931—A final judgment was entered in the condemnation action and the record owner of the property was paid $5,376.20.
2. January 22, 1932—The City took possession of the condemned property and devoted it to public use as part of a city street, grading, paving and improving it with curb and sidewalk, and has continued to this date to devote it to the same use.
3. October 19, 1938—The then holder of the street bond caused the lien thereof to be oreclosed by the City Treasurer, claiming as of said date the sum of $104.06, including penalties and interest, and Certificate of Sale No. 3108 in said amount was issued by the City Treasurer to one Al Schuh on the same date.
4. March 8, 1950—The said Al Schuh assigned said Certificate of Sale to one Betty Wilson.
5. August 23, 1950—A City Treasurer's deed was issued to said Betty Wilson.
6. April 12, 1951—Betty Wilson quitclaimed the subject property to H. J. Wilson, petitioner herein.
7. April 13, 1951—H. J. Wilson commenced the original action herein.

Neither petitioner, nor any of his predecessors in interest, nor anyone at all, has paid any taxes on the condemned portion of the subject property since June 23, 1927, nor has any taxing agency assessed or levied taxes thereon during that time.

Argument.

The law in California has long been clear that in order to obtain compensation for land taken for street purposes it must appear that the person claiming compensation was on the date of taking the owner of the property. (*Brick v. Cazaux* (1937), 9 Cal. 2d 549, 555). The California rule is in harmony with the rule announced in *United States v. Dow* (1958), 357 U. S. 17, at pages 20 and 21, that the owner at the time the government takes property, rather than the owner at a later or earlier date is entitled to compensation. Applying this fundamental rule of California law to the taking of property subject to liens, it is the settled rule that the legal owner is entitled to compensation for the property taken, *less the amount of the lien*. This is the holding in *Thibodo v. United States* (1951, C. C. A. 9th Cir.), 187 F. 2d 249 involving bonds issued under the California Improvement Act of 1911 [California Streets and Highways Code, Secs. 6400 *et seq.*], the same type of bond involved in the case at bar. It was there stated at pages 253 to 257:

> "* * * According to the California Supreme Court, the bond itself represents the lien upon the land after it has been issued * * *.
>
> "We hold that the lien here involved is a subject of public record, charging a subsequent condemnor with constructive notice thereof. Armed with this

knowledge, the amount of the lien could have been withheld for its rightful claimant. * * *

"Under the California law, a lienholder has a present proprietary interest in the subject matter of land sought to be taken by eminent domain proceedings which confers a right to have such interest considered and determined in said action. *City of Vallejo v. Superior Court,* 1926, 199 Cal. 408, 249 P. 1084, 48 A. L. R. 610; Calif. Code Civ. Proc. (1949) Secs. 1244, subd. 2, 1246, 1246.1, 1248. See *Harrington v. Superior Court,* 1924, 194 Cal. 185, 228 P. 15. Section 1248, subd. 8, of the California Code of Civil Procedure provides that if the amount of a lien is not due at the time of entry of the judgment, the amount may be deducted from the judgment, with the lien continuing until the indebtedness is paid. This section is held applicable to street improvement liens. *City of Los Angeles v. Superior Court,* 1934, 2 Cal. 2d 138, 39 P. 2d 401. If the lien is due and overdue, the security holder is entitled to have the money awarded in the condemnation proceedings applied to the payment of his claim. *City of Vallejo v. Superior Court, supra.* The very purpose of the statute is to prevent a situation wherein the condemnor will pay the full value of the land, and thereafter will be forced to pay again to holders of liens on the land. *City of Los Angeles v. Superior Court, supra.* * * *

"The California courts recognize the doctrine that when land is taken for public use, the money awarded for such land remains, and is to be considered as, representing the land in respect to all rights and interests relating thereto. The money is

applied to discharge the liens upon the land in accordance with the rights of encumbrances in respect to the land. *Los Angeles Trust & Savings Bank v. Bortenstein,* 1920, 47 Cal. App. 421, 190 P. 850. The lien claimant may follow the fund in order to subject it to his claim even if it has been paid out to others. *Rose v. Conlin,* 1921, 52 Cal. App. 225, 198 P. 653."

To the same point see:

Weber v. Wells (1946), 154 F. 2d 1004, 1005.

In view of these authorities it is clear that petitioner is in error in contending (Pet. pp. 12-13) that the District Court of Appeal, in following *Municipal Securities Corp. v. Kansas City,* 195 Mo. App. 464, 193 S. W. 880, "has retroactively changed a rule of property law so as to deprive the petitioner herein of his property without due process of law." The law of California has always been the same as that announced in the *Missouri* case, to wit: that under the facts of the instant case petitioner's damages are to be measured by the loss of the money which should have been applied in discharge of the lien. That amount ($207.57) has been awarded to petitioner. The Court, in the *Missouri* case (193 S. W. 880, 881), very aptly phrased the applicable rule as follows:

> "So when the city laid hold of that money without right—without authority from the lienor—and without notice of his lien, paid it out to the owner of the realty, it converted the money and is liable to the lienor *in damages measured by the loss of the money which should have been applied in discharge of the lien.*" (Emphasis ours).

It has also been the settled law in California since 1919 that the date of valuation in an inverse condemnation action is the date of taking (*Conlin v. Southern Pacific R.R. Co.*, 40 Cal. App. 743, 745; *Podesta v. Linden Irr. Dist.*, 141 Cal App 2d 38, 47) This is in harmony with the rule announced in *United States v. Dow, supra*, 357 U. S. 17, at page 22, that the date of taking is the date the United States enters into possession of the property and that it is that event which gives rise to a claim for compensation and fixes the date as of which the land is to be valued. In the instant case the record is clear that the date of taking and, therefore, of valuation was January 22, 1932 when the City took possession of the property and devoted it to a public use as part of a city street, grading, paving and improving it with curb and sidewalk.

In view of the foregoing authorities it is clear that petitioner is entitled only to the value of his *lien* on the date the City's street easement was acquired and *not* the value of said easement on the date the lien was acquired (as he contends) or on any other date. The record shows without conflict that the value of the lien on said date of taking did not exceed the sum of $207.57; that is all petitioner may claim in this action and that is precisely what the California courts have awarded him.

Conclusion.

It is respectfully submitted that for the reasons above set forth the petition for writ of certiorari should be denied.

Respectfully submitted,

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